UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ALLIANCE OF AUTOMOBILE MANUFACTURERS,	)	
Plaintiff	)	
v.	)	Civil No. 02-149-B-W
MARTHA KIRKPATRICK,	)	
Defendant	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Alliance of Automobile Manufacturers filed suit against Martha Kirkpatrick, Commissioner of the Maine Department of Environmental Protection, seeking a declaration that a recently-enacted Maine law, which requires certain automobile manufacturers to, among other things, pay a one-dollar bounty for mercury switches recovered from their automobiles and to establish in Maine consolidation facilities for the collection of mercury switches, violates the Constitution of the United States, primarily the "dormant" Commerce Clause, but also the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.[1] The Alliance and the Commissioner have now submitted cross-motions for summary judgment. I recommend that the Court **DENY** the Alliance's motion for summary judgment and **GRANT** the Commissioner's motion for summary judgment.

[1] The Alliance's complaint includes a count premised on the Freedom of Speech Clause. That count was voluntarily dismissed with prejudice. (Stip. of Vol. Dismissal of Count V of Pl.'s Complaint, Docket No. 22.)

Summary Judgment Material Facts

The following facts are drawn from the parties' Local Rule 56 statements of material facts. The facts related herein are largely free of significant dispute. Prior to 2003, many motor vehicle manufacturers[2] installed in their vehicles, most commonly under the hood and in the trunk, electrical light switches containing small amounts of mercury. (Plaintiff's Supporting St. of Mat. Facts, Docket No. 19, ¶¶ 1, 2.) These manufacturers gradually discontinued using mercury light switches between 1993 and 2002, when the use of mercury light switches in new[3] motor vehicles was discontinued altogether. (Id., ¶ 5; Defendant's St. of Undisputed Mat. Facts, Docket No. 38, ¶¶ 64-68, 82, 87, 116-119.[4]) Despite this downward trend, hundreds of thousands of vehicles are currently in operation throughout the United States that contain mercury switches. Indeed, in the last five years General Motors Corporation ("General Motors") alone[5] has sold hundreds of thousands of vehicles containing mercury switches. (Docket No. 38, ¶ 121.) In addition to these vehicles are many more manufactured and sold by Ford and DaimlerChrysler. According to the parties' statements, any 1999 or older motor vehicle manufactured by Ford or General Motors and any 1998 or older motor vehicle manufactured by Chrysler that includes convenience lighting in its options package is likely to contain mercury

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[2] In approximately 1993, Sweden banned the sale of motor vehicles containing mercury switches, after which all European automakers discontinued the use of mercury switches in their automobiles. (Defendant's Statement of Undisputed Mat. Facts, Docket No. 38, ¶ 65.) Other foreign automakers, specifically Toyota and BMW, never installed mercury switches in their automobiles. (Id., ¶ 64.)

[3] Malfunctioning mercury switches contained in pre-2003 model year motor vehicles may still be replaced with mercury switches, where inventories are available, though it is now prohibited for any person to sell or distribute in Maine mercury switches for installation in motor vehicles. 38 M.R.S.A. § 1665-A(2).

[4] The Commissioner's principal statement of facts suffers from significant redundancy. Note, too, that the cited statement is a revised edition, hence it appears higher in the docket than does the Alliance's opposition statement. The reason for this is that the Alliance produced the Joint Appendix and the Commissioner submitted revised statements in order to cite the documents contained therein by tab number.

[5] General Motors Corporation's sales account for approximately 28 percent of the American motor vehicle market. (Docket No. 38, ¶ 108.)

switches. (Docket No. 38, ¶¶ 20D, 67.) Although the volume of mercury contained in a single mercury switch is small, the total volume of mercury contained in these vehicles is suggested by the following fact: according to General Motors's estimate, when it eliminated mercury from the under hood convenience lamp switches in just its Chevrolet Silverado pickup truck, it eliminated over one ton of potential mercury exposure to the environment per model year. (Id., ¶ 123.) Although the total annual number of mercury-laden vehicles that end their useful lives in Maine is not suggested in the parties' statements, in each of the last five years General Motors alone has sold in Maine over 15,000 motor vehicles. (Id., ¶ 138.)

The parties are in agreement that mercury is a toxic metal and that the release of mercury poses a threat to the environment and human health. (Id., ¶ 137.) Due to the harm that mercury is capable of causing Maine citizens and wildlife, the Maine Legislature has taken measures to curtail the volume of mercury released into the environment both locally and, with the advent of the Act challenged herein, upwind. According to a 1998 report issued by Maine's Land and Water Resources Council, air emissions are the most significant pathway for mercury contamination of Maine's environment due to precipitation of airborne mercury and consequent deposition on Maine land and waters surfaces. (Defendant's St. of Undisputed Mat. Facts, Docket No. 38, ¶¶ 4, 5.) According to the Council, approximately 78 percent of Maine's anthropogenic[6] deposition of mercury stems from emissions originating in the Northeast United States. (Id., ¶ 5.)

Beginning in 1998, the Maine Legislature commenced a series of legislative enactments designed to, among other things, remove mercury-laden consumer, medical and industrial goods from Maine's waste stream. (Id., ¶¶ 8-10.) Of the numerous mercury-laden products identified

[6] The parties agree that approximately one-third of global mercury emissions are from natural sources such as volcanoes and forest fires, and two-thirds are from anthropogenic sources. (Docket No. 19, ¶ 17.)

by the Land and Water Resources Council, the mercury switches contained in motor vehicles ranked fourth in terms of annual mercury generation. (Id., ¶ 10.) According to an estimate by General Motors, mercury contained in hood and trunk convenience light switches accounted for some 9.6 tons per year. (Id., ¶ 100.) More than 99 percent of mercury contained in motor vehicles is contained in these switches. (Id., ¶ 20A.) Although there is no evidence that the mercury contained in mercury switches poses a threat to human welfare or the environment while encapsulated within a switch, there are various pathways by which it can enter the environment at the end of a motor vehicle's useful life. (Docket No. 19, ¶¶ 6, 7, 8.)

The dismantling and recycling of end-of-life motor vehicles has given rise to its own industry, described by the parties as the end-of-life vehicle industry, or ELV industry. A portion of this industry is comprised of the junk yards and salvage yards that dismantle ELVs and send their metal frames and chassis scrap ("motor vehicle hulks" or "hulks") to be crushed and/or shredded and then smelted into recycled metal. (Id., ¶ 7.) It is estimated that Maine is home to between 700 and 800 dismantling operations. (Defendant's St. in Opp. . . . and Supp. St. of Add. Mat. Facts, Docket No. 37, ¶ 8 Supplemental.) These dismantlers are licensed at the local level. (Docket No. 37, ¶ 8 Supplemental.) None of Maine's dismantlers engage in shredding or smelting; those operations are performed by businesses located outside of Maine. (Docket No. 19, ¶¶ 7, 8, 9, 10, 12; Docket No. 37, ¶ 15.) Because no Maine businesses engage in shredding or smelting operations, the mercury contained in mercury switches is most likely to be released at shredding and smelting facilities located outside of Maine, unless Maine dismantlers remove the switches prior to sending motor vehicle hulks out of the State.[7] (Docket No. 38, ¶ 20E.) It

[7] The Alliance does not contest that mercury switches ought to be removed prior to crushing, shredding or smelting. The Alliance also agrees with the Maine Legislature's decision to have mercury switches removed from ELVs, rather than in-service vehicles, and that the duty to remove the switches should fall on the ELV industry. (Docket No. 27, ¶¶ 95, 96, admitting statements contained in Docket No. 38, ¶¶ 95, 96.)

appears that there are three primary pathways by which the mercury in mercury switches is introduced to the natural environment: it might fall to the ground during crushing and shredding operations, be smelted directly into recycled metal, or be discharged into the atmosphere through smokestacks connected to smelting operations. (Id., ¶¶ 20E, 20F, 20G, 20H, 52, 113.)

States containing large numbers of smelting operations employed for the purpose of recycling motor vehicle hulks (New York, New Jersey, Pennsylvania and Ohio) are located upwind from Maine. (Id., ¶ 20H.) As a result, mercury emitted from these smokestacks may ultimately be deposited on Maine land and water surfaces, whereupon it can be converted into methyl mercury, a neurotoxin that bio-accumulates as it progresses up the food chain. (Id., ¶¶ 20H, 115.) As the Alliance itself puts forth in its statement of undisputed material facts, "Air emissions are the most significant pathway for mercury contamination of Maine's environment. Mercury present in the atmosphere is washed out via precipitation. The mercury present in precipitation . . . may have its origins in other continents, the U.S., New England, or Maine." (Docket No. 19, ¶ 16.)

The Maine Legislature has enacted a mercury switch recovery scheme in order to prevent mercury switches in Maine ELVs from being incinerated in out-of-state smelting operations. This statutory scheme is referred to throughout the parties' briefs as L. D. 1921 and is codified at 38 M.R.S.A. § 1665-A. I will refer to it simply as the Act. Pursuant to subsection 1 of the Act, it is now unlawful to sell in Maine motor vehicles containing mercury switches. 38 M.R.S.A. § 1665-A(1). Pursuant to subsection 3 of the Act, Maine junk yards and scrap yards are prohibited from "sending" ELVs containing mercury switches to be "flattened, crushed or baled" without first removing their mercury switches, unless the facility that performs flattening, crushing or

baling operations agrees to remove the mercury switches itself.[8] Id., § 1665-A(3). The Alliance does not object to either of these provisions. Its challenge is targeted instead at four particular provisions found in subsection 5 of the Act. Subsection 5 provides as follows:

> 5. MOTOR VEHICLE MANUFACTURER RESPONSIBILITY.
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> Manufacturers of motor vehicles sold in this State that contain mercury switches or mercury headlamps shall, individually or collectively, do the following:
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> A. By January 1, 2003, establish and maintain consolidation facilities geographically located to serve all areas of the State to which mercury switches removed pursuant to this section may be transported by the persons performing the removal. A consolidation facility may not be a facility that is licensed in the State as a new or used automobile dealership;
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> B. Pay a minimum of $ 1 for each mercury switch brought to the consolidation facilities as partial compensation for the removal, storage and transport of the switches;
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> C. Ensure that mercury switches redeemed at the consolidation centers are managed in accordance with the universal waste rules adopted by the board under subsection 8; and
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> D. Provide the department and persons who remove motor vehicle components under this section with information, training and other technical assistance required to facilitate removal and recycling of the components in accordance with the universal waste rules adopted by the board under subsection 8, including, but not limited to, information identifying the motor vehicle models that contain or may contain mercury switches or mercury headlamps.
>
> The goal of this collection and recycling effort is to collect and recycle at least 90 pounds of mercury per year from mercury switches removed from motor vehicles. By September 30, 2002, motor vehicle manufacturers shall provide the department with a plan as to how they intend to comply with the requirements of this subsection.
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> In complying with the requirements of this subsection, manufacturers of motor

[8] The Alliance contends that Maine law prior to § 1665-A required junk yards and scrap yards to remove mercury switches before sending ELV hulks for recycling. The Commissioner denies this assertion and takes the position that there was no such requirement prior to passage of § 1665-A. As discussed below, I am not persuaded that this issue is material to the dispute.

> vehicles shall establish a system that does not require a person who removes a mercury switch to segregate switches separately according to each manufacturer of motor vehicles from which the switches are removed.

The Act was signed into law by the Governor on April 10, 2002. (Docket No. 38, ¶ 42.) On September 30, 2002, the Plaintiff submitted its initial Compliance Plan to the Maine Department of Environmental Protection ("MDEP"). The Plan represented that certain Alliance members would contract with a company already operating a universal waste management and recycling center in the State of Maine to operate two consolidation facilities serving all of the participating manufacturers. The manufacturers' plan stated that each container of mercury switches delivered to the consolidator should be accompanied by a sheet showing the makes, models, years and vehicle identification numbers of the source vehicles. (Id., ¶ 43.) Pursuant to its rulemaking authority, the MDEP provisionally approved the manufacturer's plan, but indicated that dismantlers could only be required to provide vehicle identification numbers for each switch. (Id., ¶ 44.) It is expected that the use of vehicle identification numbers to allocate responsibilities among automobile manufacturers will enable the manufacturers to allocate costs amongst themselves. (Id., ¶ 111.)

Mercury switch consolidation facilities have now been "established" in Bangor and Portland and are presently accepting switches. (Id., ¶¶ 45, 140.) Pursuant to contractual arrangements with these facilities, Alliance members pay the facilities two dollars per switch: one dollar in accordance with the Act's bounty provision and another in administrative costs to the consolidation facilities. (Id., ¶ 145; Docket No. 27, ¶ 145.) The Alliance asserts that its members incurred roughly $200,000 in start up costs as of December 31, 2002, and project annual costs of $120,000. (Plaintiff's Opp. St. of Mat. Facts, Docket No. 27, ¶ 48, admitting statement contained in Docket No. 38, ¶ 48.) However, it also indicates that it does not know the

true cost and that these figures reflect "back of the envelope stuff," including such items as "establishing individual contractual relationships" with the consolidator and labor costs associated with paying manufacturer employees to administer the contracts and attend to general compliance obligations. (Docket No. 38, ¶¶ 142-144; Docket No. 27, ¶¶ 142-144; see also Joint Appendix Tab 27, p.4, ¶ 4.) Hard costs on record appear to be roughly $350.00, or $2.00 per switch for the 175 switches recovered as of the close of the summary judgment record. (Docket No. 38, ¶ 140; Docket No. 27, ¶¶ 140, 145.)[9]

[9] The parties' various summary judgment statements present a considerable amount of legislative history, much of it consisting of oral statements made by particular legislators in the course of floor debates. I have not reproduced much of this information herein, considering it to be immaterial in the main. The questions presented essentially require the Court to consider the benefits of an act with its burdens and whether those burdens and their allocation can be supported by a legitimate rationale. What the benefits are to the State and its citizenry and what the burdens are to the Plaintiff can largely be assessed based on the unambiguous statutory language and the factual showings made by the litigants. I recognize that the Alliance considers the legislative record to be the soil from which its claims grow, but that is simply indicative of a major weakness in its case. For example, the foundation of the Alliance's claims is the contention that "the legislative debates focused *exclusively* on the question of who should pay" and that the legislative agenda was to ensure that "Maine voters should not have to pay if outsiders could be forced to do so." (Plaintiff's Reply Memo., Docket No. 31, at 1 & 3.) But this does not aid the analysis because there is nothing fundamentally wrong with the State imposing burdens on "outsiders" so long as the imposition does not disrupt the Nation's commerce and a rational nexus exists between the imposition and the outsiders' conduct, as opposed to exclusive reliance on fundamentally unfair classifications or actual animus. See, Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."); Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) ("This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the [Commerce Clause] issue to be decided in this case. Contrary to the evident assumption of the state court and the parties, the evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment."); FCC v. Beach Communications, 508 U.S. 307, 314 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). In the words of Supreme Court Justice Robert Jackson:

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential [or gubernatorial] approval, where that approval is given. It is not to be

DISCUSSION

The Alliance's challenges to the Act concern, specifically, the (1) one dollar per switch bounty, (2) the requirement that they "establish and maintain consolidation facilities," (3) the prohibition against using automobile dealerships as consolidation facilities, and (4) the prohibition against requiring dismantlers "to segregate switches separately according to each manufacturer." According to the Alliance, these four provisions offend the dormant Commerce Clause as well as the equal protection and due process components of the Fourteenth Amendment.[10]

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002).

> Once a properly documented motion has engaged the gears of Rule 56, the party to whom the motion is directed can shut down the machinery only by showing

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> supposed that, in signing a bill, the President [or Governor] endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-396 (1951) (concurring opinion). In short, "[t]he motivation of particular members of the state legislature does not render a valid statute invalid." Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Com., 837 F.2d 600, 616 (3d Cir. 1988). As an illustration of the problem, consider the fact that the language of the Act shields automobile dealerships from the burdens associated with mercury switch recovery. This fact is immediately obvious from the statutory language. The fact that a legislator might have stated that that was the purpose of the provision, thus, comes as no surprise and does nothing to further the case.

To the extent that the Alliance believes that one or more of the statements of legislative history is material to the outcome of this case and would require the Court to decline to follow my Recommendation, it should so state in an objection and make an effort to explain therein why that statement of fact is material.

[10] Unlike the Alliance's summary judgment memoranda, the Alliance's complaint apportions its claims differently, challenging the bounty and consolidation provisions exclusively under the dormant Commerce Clause and contesting the other two provisions based exclusively on equal protection and due process concepts. Although it was not lost upon the Commissioner, I overlook this discrepancy in light of the liberal notice pleading requirements of Rule 8.

> that a trialworthy issue exists. As to issues on which the summary judgment target bears the ultimate burden of proof, she cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. Not every factual dispute is sufficient to thwart summary judgment; the contested fact must be "material" and the dispute over it must be "genuine." In this regard, "material" means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, "genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .

McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). Given the state of the record and the nature of this case, it is apparent that the Court can and should enter final judgment at the summary judgment stage.

I. The Dormant Commerce Clause

Article I, Section 8, Clause 3 of the Constitution cedes to Congress the power "to regulate Commerce . . . among the several States." The Supreme Court has recognized as implicit within this affirmative grant of power is a "negative" or "dormant" aspect that restricts the ability of state and local governments to burden interstate commerce by impeding private trade in the national marketplace through local regulation or taxation. GMC v. Tracy, 519 U.S. 278, 287 (1997). Overarching all Commerce Clause cases is the purpose for which the Commerce Clause was enacted. That purpose, in a nut shell, is to ensure that every producer of goods or services "shall be encouraged to produce by the certainty that he will have free access to every market in the Nation [and that] every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

The dormant Commerce Clause has been awakened under a handful of scenarios. One scenario involves state regulation or taxation that is designed to give domestic enterprises some commercial advantage over out-of-state competitors, e.g., New Energy Co. of Ind. v. Limbach,

486 U.S. 269, 273-74 (1988) ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States . . . ."); West Lynn Creamery v. Healy, 512 U.S. 186, 199-200 (1994) (invalidating a Massachusetts milk pricing order where a tax on milk, though applied equally to in-state and out-of-state producers of milk, was joined with a subsidy that paid the entire tax assessment out to only in-state producers). Another scenario presents regulation that "overtly blocks the flow of interstate commerce at a State's borders." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). These cases are typically described as "discrimination" or "economic protectionism" cases. New Energy, 486 U.S. at 278-79.[11] A third scenario involves regulatory measures that are neither discriminatory nor protectionist, but have the effect of regulating commercial activity occurring in other states. E.g., Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) (holding that an Illinois securities law violated the dormant Commerce Clause because of its "nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere"). The bon mot typically applied to these cases is "extraterritorial effect."[12] Id. Both the "discrimination/protectionism" cases and the "extraterritorial effect" cases fall into the larger bucket of cases involving "direct restraints" on interstate commerce. Id. at 642. A fourth general scenario involves those cases in which a state law, though not necessarily protectionist, discriminatory or extraterritorial, "comes [into] direct collision" with federal regulation of interstate commerce, Gibbons v. Ogden, 22 U.S. 1, 221 (1824), "undermine[s] a compelling need

[11] Other primary cases cited by the parties that involved discrimination/protectionism scenarios are Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100-101 (1994), Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992); Maine v. Taylor, 477 U.S. 131, 138 (1986), and New Energy Co. v. Limbach, 486 U.S. 269, 274-75 (1988).

[12] Another good example of an extraterritorial effect case is Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 582 (1986) (invalidating New York wholesale liquor price control legislation because "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce").

for national uniformity in regulation," GMC v. Tracy, 519 U.S. at 298 n.12 (citing cases), or is otherwise "inimical to the national commerce," Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) (involving intrastate train regulations). The final, catchall scenario involves statutes having only an indirect or incidental effect on interstate commerce, but which impose "clearly excessive" burdens on commerce in relation to "the putative local benefit." Pike v. Bruce Church, 397 U.S. 137, 142 (1970) (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)). The Supreme Court has recently dubbed cases falling into the last scenario "so-called Pike undue burden" cases, GMC v. Tracy, 519 U.S. at 300 n.12.

Although dormant Commerce Clause cases come in a variety of guises, the threshold inquiry in most cases is "directed to determining whether [the regulation in question] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S. at 624. This initial inquiry is crucial. If the regulation discriminates against interstate commerce on its face, then "the virtually per se rule of invalidity provides the proper legal standard" and the regulation will be invalidated "unless [the state] can 'show that it advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives.'" Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 100-101 (1994) (quoting New Energy, 486 U.S. at 278). Otherwise, if the regulation is not facially discriminatory against interstate commerce, but affects interstate commerce only indirectly, then the court must be persuaded[13] that the regulation imposes a clearly excessive

[13] Although it is sometimes stated that the "burden of proof" falls exclusively on the plaintiff when the Pike standard is applied, see, e.g., Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1036 (4th Cir. 1980); Lenscrafters, Inc. v. Wadley, 248 F. Supp. 2d 705, 733 (M.D. Tenn. 2003), my assessment is that the Supreme Court has not expressly assigned burdens of proof, but rather burdens of persuasion. See Pike:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on

burden on interstate commerce in relation to the putative local benefit. Pike, 397 U.S. at 142. In its principal memorandum of law, the Alliance attempts to side step this threshold consideration with a unique argument for the application of a "strict scrutiny," or per se invalid, standard. It essentially contends that its lack of success in its lobbying efforts makes strict scrutiny particularly appropriate. (Docket No. 18 at 19-21.) In taking this position, the Alliance appears to be asking the Court to take judicial notice of a less-than-obvious proposition: that automobile manufacturers are powerless to influence the Maine political process because they do not have manufacturing or assembly plants or facilities in Maine. (Id. at 19-21.) In my opinion, the suggested approach is entirely untenable and so is the suggestion that the Court might somehow find that the plaintiff had no ability to meaningfully influence the legislative process behind the Act. I am utterly at a loss as to why the Court should adjust the applicable legal standard based on how much relative influence a given plaintiff may have enjoyed with the Legislature. How could the Court meaningfully determine this question, let alone what the plaintiff might have reasonably accomplished had it chosen to exert itself in the legislative process more vigorously or in a different fashion? I find the suggestion impractical, particularly when one considers that the question at issue concerns the impact the Act has on interstate commerce, not the legislature's relative attentiveness to the plaintiff's private concerns.[14]

> such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142. Stated this way, it is conceivable that either party might jeopardize its case in certain circumstances by failing to introduce evidence at the summary judgment stage. In any event, whatever the burden of production might be, the burden of persuasion rests primarily with the plaintiff, particularly when it comes to the critical issue of excessiveness. N.H. Motor Transp. Ass'n v. Flynn, 751 F.2d 43, 48 (1st Cir. 1984) ("[T]he burden of proving 'excessiveness' falls upon the [plaintiff], not the state.")

[14] The Alliance cites some notable Supreme Court opinions in support of its position, most notably West Lynn Creamery, 512 U.S. at 200 ("Nondiscriminatory measures, like [an] evenhanded tax . . . are generally upheld, in spite of any adverse effects on interstate commerce, in part because 'the existence of major in-state interests

Before describing the Alliance's specific arguments, it is important to understand what the Alliance is not arguing. The Alliance does not argue that the Act is unconstitutional for any of the following reasons: because of an extraterritorial effect; because of a compelling need for national uniformity in the regulation of mercury switch disposal[15]; or because of the existence of preemptive federal regulation.[16] Nor does the Alliance contend that the Act in any way impedes its members' ability to market their products and services in Maine or in the broader interstate marketplace. Rather, the Alliance is complaining that the Act imposes unfair or unreasonable financial burdens on certain of its members because it forces them to pay a bounty to automobile dismantlers and to establish mercury switch consolidation facilities in Maine for the collection and disposal of mercury switches. (Docket No. 18 at 2-3.) According to the Alliance, this legislative scheme is blatantly protectionist and discriminatory because financial burdens are

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adversely affected . . . is a powerful safeguard against legislative abuse.'") (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)). (Plaintiff's Reply Memo., Docket No. 31 at 7.) However, these cases reflect a rationale the Supreme Court has used, in the context of the Pike undue burden test, as an additional justification for upholding challenged regulations. See, e.g., Clover Leaf Creamery, 449 U.S. at 473 & n.17, and the cases cited therein. The Alliance's suggestion that these cases support the application of a strict scrutiny standard turns this line of precedent on its head. These cases all apply the Pike undue burden test, which reflects the Court's preliminary conclusion that the regulations at issue should not be subjected to heightened scrutiny.

For a taste of the kind of fact finding the Alliance's approach would require the Court to make, see the Defendant's Statement of Additional Material Facts, Docket No. 37, paragraphs 15 and 18, her Statement of Undisputed Material Facts, Docket No. 38, paragraphs 31 and 32, and the Declaration of Gregory Dana submitted by Plaintiff and contained in the Joint Appendix at Tab 32, ¶ 3, which recount some aspects of the Alliance's lobbying efforts. Obviously, much lobbying activity has nothing to do whatsoever with the common weal. In this light, how could the Court realistically weigh whether a plaintiff had a meaningful influence on the legislative process without also evaluating the merits of a plaintiff's lobbying efforts? To permit the parties to litigate this immaterial issue and to have the Court resolve it would essentially have this Court enforce the dormant Commerce Clause by ignoring the separation of powers doctrine. This Court is not a super-legislature. Legislative favoritism, in and of itself, is not subject to judicial review. Moreover, modifying the burden of proof plaintiff by plaintiff depending on some political influence standard, as the Alliance suggests, would have the Court violating the Equal Protection Clause.

[15] The Alliance does argue that the potential for other states to enact similar statutes should be considered when calculating the burden imposed by L. D. 1921 (Docket No. 18 at 31), but it does not suggests that a nationally uniform regulation should be imposed for the abatement of mercury switches.

[16] In Philadelphia v. New Jersey, the Supreme Court found that there was no "clear and manifest purpose of Congress . . . to pre-empt the entire field of interstate waste management or transportation . . . . To the contrary, Congress expressly has provided that 'the collection and disposal of solid wastes should continue to be primarily the function of [s]tate, regional, and local agencies.'" 437 U.S. 620 n.4 (quoting 42 U.S.C. § 6901(a)(4)) (internal quotation marks and citation omitted).

being imposed on automakers in order to subsidize participants in Maine's domestic ELV industry. (Id. at 3.) Alternatively, the Alliance would advance its cause under the so-called Pike undue burden standard. My assessment is that the Act is plainly not facially discriminatory, and therefore not appropriate for consideration under the per se invalid approach, that the Act is probably not even susceptible to Commerce Clause challenge at all, and that, in any event, it passes muster under the Pike undue burden standard.

A. The Act's Provisions Are Not Per Se Invalid.

Contrary to the Alliance's claim, this case does not involve direct discrimination or protectionism. The Act's provisions apply without respect to domicile; they do nothing to discriminate in favor of domestic automobile manufacturers. Maine has no domestic automobile manufacturers to promote. (Docket No. 38, ¶ 46.) Cases in which the per se invalid language has been invoked involve regulatory measures that expressly make reference to in-state and out-of-state status as a factor on which differential treatment is based. E.g., Oregon Waste, 511 U.S. at 96 (concerning statutory "'surcharge' on 'every person who disposes of solid waste generated out-of-state'"); New Energy Co., 486 U.S. at 273-74 ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States . . . .") The Act under consideration here does not facially make the imposition of any burden or withholding of any benefit turn on in-state versus out-of-state status. If it did, the Alliance would not have to resort entirely to the legislative history in its effort to obtain a finding of discriminatory or protectionist intent.

B. The Act is Likely Insusceptible to Invalidation Under the Supreme Court's Dormant Commerce Clause Jurisprudence.

There appears to be available a very fundamental obstacle to the Alliance's ability to pursue its Commerce Clause claim under either the per se invalid or the undue burden approach.

Recent Supreme Court precedent has strongly suggested that Commerce Clause claims of the kind at issue here (alleged protectionism) cannot jump across markets, but exist only where the state regulation at issue impacts the relative advantage of in-state and out-of-state enterprises in relation to their ability to compete in their particular market. GMC v. Tracy, 519 U.S. at 300 (holding that more favorable tax treatment of certain in-state natural gas sellers was not protectionism because those sellers served a different market than the less favorably treated, out-of-state sellers); see also Pharm. Research and Mfrs. of America v. Walsh, 123 S. Ct. 1855, 1871 (2003) ("Petitioner argues that Maine's Rx fund is similar [to a protectionist local subsidy funded by out-of-state businesses] because it would be created entirely from rebates paid by out-of-state manufacturers and would be used to subsidize sales by local pharmacists to local consumers. Unlike the situation in West Lynn, however, the Maine Rx Program will not impose a disparate burden on any competitors."). In a footnote to GMC v. Tracy, the Supreme Court suggested that even in the context of Pike-indirect burden claims a claimant must make a preliminary showing that the challenged regulation impacts competition in a particular market. 519 U.S. at 300 n.12 (suggesting that proof of "actual or prospective competition" should be shown even in the "so-called Pike undue burden test"). Notably, every Justice on the Court agreed with this portion of the Court's opinion (Part IV), including the lone dissenter. Id. at 314 (Souter, J., dissenting, but agreeing, inter alia, with Part IV of the Court's opinion). Indeed, it stands to reason that a claimant raising the dormant Commerce Clause should show how invalidation of the challenged regulation would serve the purposes of the Commerce Clause, which are to ensure that producers of goods and services have access to the Nation's markets, that consumers have ready access to the Nation's products and services, and that the national economy is protected from the kind of economic Balkanization that plagued the colonies and

confederated states.[17] Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979); H. P. Hood & Sons, 336 U.S. at 539. It is not apparent that the challenged provisions of the Act infringe upon any of these overarching goals. Nor has the Alliance produced any evidence or made any argument showing how these overarching goals—as opposed to its own economic interests—are even implicated by the Act.

In my assessment, the Alliance fails utterly, though understandably, to demonstrate that the Act undermines the ability of automakers to compete against any Maine enterprise in any market context. This would appear to be an effective bar to processing this case under the Commerce Clause. GMC v. Tracy, 519 U.S. at 300 ("Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply."); see also Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 601 ("Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.") (Scalia, J., dissenting); id. at 583 (reflecting majority's agreement with Justice Scalia's characterization of the holding in GMC v. Tracy). In its principal memorandum, the Alliance makes no reference at all to this "market" prerequisite of a Commerce Clause challenge. Instead, it continually describes the applicable standard as prohibiting, broadly, differential treatment of in-state and out-of-state "economic interests." (Docket No. 18 at 3 (citing Oregon Waste Sys., Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 99

[17] The Third Circuit characterizes the GMC footnote as standing for the proposition that "[w]hen a facially neutral law has the effect of disproportionately burdening out-of-state interests, it can be difficult to determine whether the burden rises to the level of discrimination against interstate commerce." Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 211 (3d Cir. 2002) (involving minimum wholesale milk price regulation having "the effect of protecting in-state businesses by eliminating a competitive advantage possessed by their out-of-state counterparts"). It appears that the footnote has not been taken up in any other published opinions to date.

(1994).) This "economic interest" shorthand should not be misconstrued as eliminating the market requirement set forth in GMC v. Tracy. Oregon Waste clearly concerned differential treatment of in-state and out-of-state participants in a particular market, because the regulation at issue there imposed a heightened disposal fee on interstate waste haulers as compared with intrastate waste haulers, thus discriminating against interstate haulers with respect to their ability to access in-state landfills. 511 U.S. at 99.

Instead of attempting to show that a particular market is at issue here, the Alliance's principal memorandum seems to draw clear distinctions between its industry and the Maine ELV industry, complaining that it is patently discriminatory to "tak[e] money from law-abiding out-of-state companies whose product is not inherently harmful, and giv[e] the money to in-state companies that might otherwise misuse the product and violate the law." (Docket No. 18 at 23.) However, the Alliance changes its tune in the opposition memorandum filed in response to the Commissioner's motion for summary judgment. In this memorandum, the Alliance argues that the Act has forced its members to enter the ELV industry by requiring them to set up consolidation centers to accept mercury switches. (Docket No. 26 at 4.) I find this argument unpersuasive. The Act does not force automobile manufacturers to enter the ELV industry, but requires them to pay a fee for mercury switch recovery and to take back those switches recovered by the automobile dismantlers. There is absolutely nothing in the facts to suggest that automobile manufacturers have become competitors in the ELV market. Rather, the facts reveal that some Alliance members are paying a fee for mercury remediation and are being forced to make arrangements for remittance of mercury switches in Maine. Although these activities may transpire within the all-encompassing parameters of interstate commerce, they have not created a market in which manufacturers compete with either dismantlers or consolidators. If the dormant

Commerce Clause loomed over every interstate commercial relationship, as opposed to market, it would truly know no bounds. It is perhaps for this reason that the "competitors in a particular market" requirement is so appealing. It promises to provide one bright line limitation on the scope of the Commerce Clause.

Because the Maine ELV industry that the Alliance points to simply is not competing in any market or in any manner with automobile manufacturers, the Commissioner is likely entitled to summary judgment against the Commerce Clause claim. Nevertheless, I address the balance of the Alliance's argument because, arguably, the Pike undue burden test could be applied in this context.

C. The Act's Provisions Are Not Excessively Burdensome on Interstate Commerce.

Non-discriminatory and non-protectionist regulations that have indirect or incidental effects on interstate commerce are valid unless the party challenging the regulations can demonstrate that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). If one assumes that the Pike undue burden test can jump across markets, it does not appear that the financial and administrative burdens imposed on certain Alliance members are "clearly excessive" in relation to the local benefit.

In order to assess the burdens and benefits of the Act, the Court must resolve a minor skirmish about what benefits and what burdens may properly be placed on the scales. The Alliance urges that the Court must weigh in favor of Alliance members every foreseeable burden that might arise from the Act, including the hypothetical burden that would arise if similar legislation were enacted in other states, but may weigh in the State's favor only the benefits that arise from one isolated provision at a time. In the Alliance's words:

> There are only four aspects of L. D. 1921 under a Commerce Clause challenge in this case, so it is only the costs and benefits associated with those specific provisions that are genuinely at issue. Thus neither the costs nor the benefits of the provision that requires removal of mercury switches before a vehicle is recycled is properly part of the equation. Neither are the costs and benefits of the prohibition against the sale of new vehicles that contain mercury switches, nor the costs and benefits of requiring labels on vehicles with mercury components. . . . [N]one of them has any bearing on the issues the Court is called upon to decide.
>
> Instead, proper focus is on the costs [on] interstate commerce of the bounty, consolidation facility, protection of dealerships, and non-segregation of switches sections [in unison]. . . . .
>
> For commerce clause purposes, there is no benefit to weigh against these costs. Any constitutionally legitimate benefits of L. D. 1921 derive from parts of the law that are not challenged, such as the requirement to label vehicles with mercury components, and the requirement to remove mercury switches before a vehicle is recycled. . . . .
>
> Nor should the costs associated with L. D. 1921 be viewed in isolation. If one [s]tate may require manufacturers in Michigan, Japan, Germany and the United Kingdom to go into the recycling business and pay bounties, "so may other States." Edgar v. MITE Corp., 457 U.S. 624, 642 (1982).

(Docket No. 18 at 29-31; see also Docket No. 31 at 4.) This is not a fair statement of the law. Although there are numerous cases in which courts have found a specific regulatory provision to impose an excessive burden on interstate commerce without striking down the entire regulatory scheme, that does not mean that the Court must artificially isolate each of the challenged provisions and ignore its relationship to the larger regulatory scheme. Frankly, the Court cannot meaningfully consider the relative burden or benefit of a particular provision without considering its relationship to the whole of the Act any more than it can evaluate the burden or benefit of the whole without appreciating the relationship among the individual provisions that comprise it. See, e.g., West Lynn Creamery, 512 U.S. at 199-200 & n.16 (concluding that a nondiscriminatory tax imposed equally on in-state and out-of-state milk producers became

excessively burdensome on interstate commerce by virtue of a related provision that used the revenue from the tax to provide a subsidy to in-state producers).

In supposed support of its position that the Court should consider the kind of burden that might arise if other states enacted similar regulatory schemes, the Alliance cites Edgar v. MITE Corp., 457 U.S. 624 (1982). In that opinion the following quotation can be found: "[I]f Illinois may impose such regulations, so may other States." Id. at 642. However, in Edgar the Supreme Court dealt with a blue sky law that had "sweeping extraterritorial effect," essentially purporting to regulate securities transactions in domestic corporations occurring "wholly outside the State." Id. at 642 & 643. In this light, the Court's observation about the problems that would arise if other states followed suit served the purpose of illustrating the problem with regulations having extraterritorial effect: economic isolation or Balkanization. That concern is not at issue in this case. If other states were to follow Maine's lead on mercury switch recovery, the consequence would be akin to multi-state bottle bills, not the kind of interruption of interstate commerce that might arise if securities transactions could not be engaged in or if every state imposed its own unique regulatory scheme on interstate railroads.[18]

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[18] Even if the theoretical costs of multi-state enactment could be incorporated into the Court's analysis, the question would still essentially be whether the cost of switch recovery is excessive in relation to the ameliorative effect of preventing mercury incineration or other release, whether on a per switch or aggregate basis, such as the Nationwide average cost per switch. Of course, prior to such an occurrence Congress might always preempt the field. New Hampshire Motor Transp. Ass'n v. Flynn, 751 F.2d 43 (1st Cir. 1994) is illustrative:

> [T]he truckers separately argue that if New Hampshire can impose [license fees for transporters of hazardous wastes] so can other states. If many or all states do so, the resulting fee system will greatly raise transport costs and seriously burden interstate commerce. [There is a concern that the] "burden of proof" rules mean that each state can charge an amount that cannot be *proved* excessive. The sum total of charges that cannot be *proved* excessive may well exceed the sum total of the *actual* cost of state services. Nonetheless, there is a conclusive answer to the argument here, for Congress has specifically delegated to the Department of Transportation ("DOT") the power to promulgate rules that preempt state law in this area. . . . Should the circumstance that the truckers fear come to pass, a remedy is close at hand. DOT can promulgate a regulation prohibiting or controlling the imposition of excessive license fees. Under these circumstances, there is no practical reason to fear significant state barriers to interstate commerce . . . .

Id. at 50.

1. Elaborating on the "so-called Pike undue burden test"

Before addressing the challenged provisions of the Act, Pike's undue burden standard deserves a little more explanation. The plaintiff in Pike, Bruce Church, Inc., was a farming operation that grew a substantial crop of particularly high-quality cantaloupes in Arizona that it shipped to California in bulk loads for processing and packaging. 397 U.S. at 139. Bruce Church shipped its cantaloupes to California in this fashion because it owned no packing sheds in Arizona that could process or pack its cantaloupes and was located in a remote part of Arizona, near the border with California, from which Arizona packing houses were not readily accessible. Id. Pursuant to Arizona's Fruit and Vegetable Standardization Act, all cantaloupes grown in Arizona and destined for commercial sale were required to be "packed in regular compact arrangements in closed standard containers approved by the [state's official] supervisor." Id. at 138-39. The supervisor exercised his authority under the Act and effectively prohibiting Bruce Church from shipping its cantaloupes to its California packing shed by disapproving Bruce Church's use of "uncrated bulk loads" to transport the cantaloupes. Id. at 138. The Supreme Court found this order not to be patently discriminatory, presumably because it extended, at least in principle, to the entire in-state cantaloupe industry. But as a practical consequence of the prohibition, Bruce Church would have lost that year's anticipated crop and would have been required to invest in processing and packing facilities in Arizona because it did not otherwise have the means of packing cantaloupes in Arizona. Id. at 140. The Supreme Court struck down the order on a finding that it imposed a burden on interstate commerce that was "excessive in relation to the putative local goals." Id. at 142. As grounds for this conclusion, the Court observed that the cantaloupes were by nature interstate goods and the order effectively rerouted their journey through the channels of interstate commerce by requiring that they be

processed and packed in Arizona. Id. at 141-42 ("[T]he application of the statute at issue here would require that an operation now carried on outside the State must be performed instead within the State so that it can be regulated there."); see also id. at 146 (describing the regulation as "a straightjacket . . . with respect to the allocation of [Bruce Church's] interstate resources"). In comparison to this burden on Bruce Church's interstate activities, the Court searched in vain for any appreciably weighty "putative local benefit." The Court observed, based in part on statements made by Arizona in its legal memoranda, that the Act had nothing to do with legitimate health and sanitation concerns, but with promoting and preserving "the reputation of Arizona growers by prohibiting deceptive packaging." Id. at 143. Although reasoning that this purpose was not illegitimate, the Court determined that it could not justify an order that forced Bruce Church to build and run a packing shed in Arizona just to ensure that Bruce Church's high-quality produce would be labeled as a product of Arizona rather than California. Id. at 144-45. Importantly, Arizona's stated interest was not only particularly "tenuous," but the burden was especially odious as well, "[f]or the Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere," id., or which "impose an artificial rigidity on the economic pattern of the industry," id. at 146 (quoting Toomer v. Witsell, 334 U.S. 385, 404 (1948)). But this was not to say that such restrictions could never be maintained. Instead, "[s]uch an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved." Id.

From Pike, two significant propositions flow. First, when it comes to the dormant Commerce Clause, health and safety regulations are more tenable than standard economic regulation. When these concerns are at issue, somewhat greater burdens may be placed on

interstate commerce than might otherwise be acceptable. Id. at 143; see also GMC v. Tracy, 519 U.S. at 306 ("[L]egitimate state pursuit of such interests [is] compatible with the Commerce Clause, which was 'never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.") (quoting Sherlock v. Alling, 93 U.S. 99, 103 (1876)); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 448 (1960) ("State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand."). On the other hand, particularly suspect are regulations that require an industry to conduct its interstate business operations in any one state or which unduly waylay goods bound for interstate markets. Pike, 397 U.S. at 145; see also Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928) (invalidating Louisiana law meant to withhold Louisiana-caught shrimp from Mississippi processing plants for the purpose of benefiting Louisiana's domestic processing industry where shrimp were destined for interstate commerce).

2. The consolidation provision does not impose a clearly excessive burden on interstate commerce.

Pursuant to subsection 5(A) of the Act, certain Alliance members have been required to "establish and maintain consolidation facilities geographically located to serve all areas of the State to which mercury switches . . . may be transported." According to the Alliance, this requirement has forced its members "to open recycling businesses at two locations in Maine" and, thus, should be stricken down like the packing order at issue in Pike. (Docket No. 18 at 2, 4.) Contrary to the Alliance's rhetoric, the Act's consolidation provision does not force manufacturers to "open recycling businesses" in Maine. As enforced, and as arranged by the manufacturers, certain preexisting businesses have been engaged to fulfill these consolidation

obligations for a fee. Although the Act reads in terms of "establishing facilities" in Maine, in fact it requires only that switch consolidation take place in Maine.[19] But simply because certain manufacturers are forced to engage in activity in Maine that otherwise would not occur does not mean that interstate commerce has been unduly interfered with. Unlike Pike, the regulation at issue here does not require manufacturers to conduct in Maine any interstate commercial operations that they would otherwise conduct outside the state. Nor does it prevent the passage of interstate goods to market. The consolidation activity that certain manufacturers must now engage in is not a commercial endeavor that they would engage in elsewhere if permitted. Likewise, the mercury switches that are recovered from ELVs are not destined for any market.[20] They are simply stowaways on dismantled automobile hulks that would otherwise come to contaminate recycled metals, the atmosphere and land and water surfaces here and elsewhere. Because the consolidation provision simply does not disrupt interstate markets or the movement of goods destined for interstate markets, it does not warrant the kind of treatment given in Pike to the administrative order that would have required Bruce Church to build a packing plant in Arizona.

Finally, when one looks at the actual showing made by the Alliance, it becomes clear that the Alliance has fallen well short of demonstrating an excessive burden on interstate commerce. First, the Alliance's evidence of its members' costs is very rough. Not only are the costs estimated, but the evidence fails to break out the cost for compliance with the consolidation

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19 In furtherance of this point, consider that the Alliance has admitted that the "only burden" it complains of "is the automakers' cost of complying with the [Act]." (Plaintiff's Opp. St. of Mat. Facts, Docket No. 27, ¶ 48, admitting statement contained in Docket No. 38, ¶ 48.)

20 At least, the Alliance has made no showing whatsoever in its summary judgment statements of material facts that the mercury switches it takes back are destined for any relevant market, such as a market in used mercury switches or the mercury recovered from its mercury switches. It would seem that the Alliance's case against the consolidation procedure would be strengthened if it could demonstrate that consolidation in Maine unnecessarily reroutes the switches from their intended market "destination."

provision itself, as distinct from the cost of compliance with the bounty provision. Thus, the Court cannot meaningfully determine what burden the consolidation provision imposes. Furthermore, even if one credits the full, $200,000 "start up" estimate and $120,000 ongoing annual costs, these costs are shared by at least three major automobile manufacturers and are designed to facilitate a mercury remediation program that is far more meritorious than the "tenuous" objective undertaken by Arizona in the Pike case. Specifically, consolidation facilitates the remediation effort because it simplifies what dismantlers must do to obtain payment of the bounty by reducing the number of entities to which they must ship switches. This simplification of the redemption process enhances the likelihood of dismantler compliance, without which the legislative scheme would not succeed. Consolidation also minimizes the number of establishments with respect to which the MDEP must exercise oversight and, by definition, minimizes the number of locations at which mercury switches will be stored.

3. The bounty provision does not impose a clearly excessive burden on interstate commerce.

Like the consolidation provision, the bounty provision does nothing to disrupt interstate markets or the movement of goods destined for interstate markets. It simply requires that certain manufacturers pay a bounty to subsidize the recovery of a toxic substance contained in their products so that it will not be released through incineration or other means. Nor does the bounty provision constitute a protectionist tariff. Although it requires that money be transferred from out-of-state businesses to in-state businesses, the requirement does not protect in-state business from competition but rather helps ensure the success of the mercury remediation effort. The bounty does nothing to alter competition in, or the access of either producers or consumers to, any particular market or product.

According to the Alliance, it is excessively burdensome on interstate commerce for the State to require an out-of-state business to pay money to an in-state business to carry out legal obligations previously imposed exclusively on the in-state business. (Docket No. 18 at 21-22). The Alliance believes that manufacturers should not be forced to bear such a burden when the State might instead police the remediation efforts of the 700 to 800 dismantlers in the State. (Id. at 24-26.) Although the parties dispute whether Maine law and regulations required scrap yards to recover mercury switches prior to the Act's passage, see 30-A M.R.S.A. § 3755-A(3)(H), I do not consider that dispute to be material. Certainly the Legislature is as free to reallocate burdens and responsibilities as it was to allocate them in the first instance. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."). Our common law landscape is littered with reallocated legal obligations. Consider, for starters, joint and several liability, indemnification and contribution, respondeat superior and vicarious liability. In any event, even if we assume that interstate commerce is at stake, the obvious answer to the Alliance's challenge is that it is not excessively burdensome to impose on those who placed mercury switches in interstate commerce a reasonable financial obligation to help ensure that the encapsulated mercury does not caused harm to public health or the environment. Although the Alliance concedes that the recovery and consolidation initiatives are laudable, they essentially believe that fairness requires the burden to be carried by Maine taxpayers and the so-called ELV industry. That the Legislature chose to encourage dismantler compliance with carrots rather than sticks is perfectly reasonable given the large number of dismantlers distributed throughout the state. Whatever fairness may require, the dormant

Commerce Clause does not preclude the bounty scheme per se. Finally, the Alliance ultimately fails to make any factual showing in support of its conception of fairness. What is offered is that the manufacturers estimate the cost of compliance to amount to roughly $200,000 in start up costs and projected annual costs of $120,000.[21] In my view, this simple showing falls short of demonstrating a clearly excessive burden in relation to the local benefit of recovering mercury switches because there are insufficient facts for the Court to make a finding of "excessiveness." Cf. N.H. Motor Transp. Ass'n v. Flynn, 751 F.2d 43, 48 (1st Cir. 1984) ("[T]he burden of proving 'excessiveness' falls upon the [challengers], not the state. . . . The [challengers] are responsible for producing a record sufficiently specific and detailed to allow the finding that they seek."). Of course, in the end, the Commerce Clause does not exist to protect the manufacturers' corporate coffers, but to protect "markets and participants in markets." GMC v. Tracy, 519 U.S. at 300; see also Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) ("[T]he [Commerce] Clause protects the interstate market, not particular interstate firms."). Moreover, it is not unconstitutional for the State "to protect its residents' pocketbooks as well as their environment." Philadelphia v. New Jersey, 437 U.S. at 626.

4. The provision "protecting" domestic automobile dealerships does not impose a clearly excessive burden on interstate commerce.

The Alliance contends that it offends the dormant Commerce Clause for the State to prevent manufacturers from using their domestic dealerships as consolidation facilities. The Alliance's explanation for this contention is that it constitutes protectionism, there being "no technical reason why dealerships cannot serve as consolidation centers." (Docket No. 18 at 27.) This argument is not productive because the consolidation provision imposes a take back

[21] See also Plaintiff's Reply Memo., Docket No. 31, at 1 ("[T]he parts of [the Act] at issue in this case are not about mercury, they are about money.").

obligation on manufacturers, it does nothing to protect Maine dealerships from their interstate competitors. Just as there is a rational basis for imposing this obligation on the manufacturing industry, there is a rational basis for ensuring that the obligation is not pawned off on the manufacturer's local dealerships. Furthermore, it is rational for the State to delimit the number and nature of consolidation facilities to streamline the handling of mercury switches, to facilitate state oversight of the program and because it is perfectly reasonable to "consolidate" consolidation facilities. In any event, the Alliance has not shown that two dealerships exist that are willing to serve as the manufacturers' regional consolidation centers on a more cost effective basis. Had it made such a showing, then perhaps it could have articulated why this provision does not advance any legitimate objective and is excessively burdensome, in context. Because the record is devoid of such evidence, there is no need to entertain that possibility.

5. The "non-segregation" provision does not impose a clearly excessive burden on interstate commerce.

The Alliance tersely states that the non-segregation provision is "a final example of the ways in which [the Act] is skewed in favor of local interests." (Docket No. 18 at 29.) This provision enables dismantlers to collect and ship switches in one container. This aspect of the Act is not burdensome on interstate commerce for the reasons already stated. Moreover, non-segregation of mercury switches might rationally facilitate the dismantlers' handling and shipping of mercury switches. Additionally, the concern raised by the Alliance, allocation of costs among manufacturers, has been addressed through regulatory approval of the manufacturers' requirement that dismantlers label individual switches with the vehicle identification number of the originating automobile. Finally, the Alliance has not presented any facts to quantify how this particular provision contributes to the cost of manufacturer

compliance. There being no costs on record, it is impossible to determine that compliance is excessively burdensome.

6. The putative local benefits of the Act are appreciable.

Maine has sought to remove a toxic substance from the ELV waste stream in order to prevent its release from upwind smokestacks and eventual deposition in Maine. The Alliance has not challenged Maine's assertion that upwind release of mercury results in appreciable mercury deposition in Maine or that the burden placed on manufacturers is wholly out of proportion to the degree of harm presented. Each of the challenged provisions appears to have a rational relationship to advancing the mercury remediation effort, although some more clearly than others. The bounty provision advances the State's mercury switch abatement objective most fundamentally by providing a financial incentive for dismantlers to remove, label and package the switches and to then ship the switches to a consolidation facility. The consolidation and non-segregation provisions also advance the remediation objective by streamlining the redemption procedures that dismantlers must follow, further increasing the likelihood of dismantler compliance. The consolidation provision also ensures that the recovered switches are handled in a manner that complies with Maine's Universal Waste Rules.[22] Finally, the no dealership provision ensures that manufacturers actually bear the primary financial obligations that the Legislature determined they, in fairness, ought to bear. It is not illegitimate for the Legislature to take this additional step to protect dealerships from a burden that they determined ought to be born by manufacturers. The dormant Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Sherlock,

[22] At the time the Act was passed, universal waste consolidators of mercury-laden products already operated in Maine and were managing such products in accordance with Maine's Universal Waste Rules. (Docket No. 38, ¶¶ 71, 72.)

93 U.S. at 103. In the absence of preemptive federal regulation, Maine's mercury switch recovery scheme is consistent with dormant Commerce Clause jurisprudence.

II. DUE PROCESS AND EQUAL PROTECTION

The Alliance next challenges the provisions of the Act under the Fourteenth Amendment. In the context of economic regulation, and in the absence of a concern over "fundamental rights," this challenge boils down to an equal protection claim subject to a "rational basis" analysis. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). Thus, to overcome the Alliance's challenge, it need only appear that "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (citing Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985), Minnesota *v.* Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981), and United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174, 179 (1980)).[23] According to the Alliance, because certain provisions in the Act serve the purpose of protecting domestic industries from certain financial and administrative burdens under the regulatory scheme, the Court should infer that these same burdens were relegated to manufacturers "solely because of their residence." (Docket No. 18 at 33 (quoting Metropolitan Life Ins. Co. v. Ward, 470 U.S.

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[23] Perhaps the most forceful recitation of this standard is in Beach Communications:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."

508 U.S. at 313-14 (citations omitted, quoting United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

869, 880 (1985)). This simply does not follow. It is far more "plausible," Nordlinger, 505 U.S. at 11, that the primary burden was imposed on manufacturers in recognition of the fact that the need for a mercury switch recovery program existed solely by virtue of the manufacturers' incorporation of these mercury-laden components in their automobiles for roughly ten years after the industry's cognizance of the mercury disposal problem. See footnote 2, supra. This "classification" does not concern fundamental rights and it reasonably sets apart manufacturers for different treatment from members of the "ELV industry" based on factors the Legislature could "rationally have . . . considered to be true." In addition to the plausible determination that manufacturers ought to carry the primary burden due to their decision to use the switches, the different treatment of manufacturers and dismantlers is rational based on the perceived need to simplify the burdens placed on dismantlers in order to encourage compliance. In other words, it was not irrational for the Legislature to conclude that the Alliance's recommended alternative of regulatory enforcement would not have been workable, or as workable, given the number and geographical distribution of dismantlers in Maine. Of the 185 people within the MDEP's Bureau of Remediation and Waste Management, only three spend a portion of their time implementing the Act. (Docket No. 37, ¶ 10 Supplemental; Docket No. 32, ¶ 10.) Finally, none of the individual provisions is "so attenuated" in relation to the mercury switch remediation effort to be "arbitrary or irrational." Nordlinger, 505 U.S. at 11. The "undue burden" discussion of the dormant Commerce Clause claim already establishes the relationship each provision has to the overall legislative agenda and need not be rehashed here. Even the non-segregation provision, which least advances the objectives of the Act due to its exceedingly picayune nature, is rationally related to the Legislature's goal of ensuring dismantler compliance. Of course, the Alliance's challenge of this particular provision is picayune, too. The record reflects that the

MDEP has approved the manufacturers' requirement that dismantlers label each mercury switch with the originating motor vehicle's identification number. Nor is there any factual showing with respect to how this minor inconvenience impacts the asserted costs of complying with the Act.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** Defendant's Motion for Summary Judgment (Docket No. 16) and **DENY** Plaintiff's Motion for Summary Judgment (Docket No. 18). I further **DENY**, without prejudice, the Motion to Exclude filed by Defendant and Amicus Plus (Docket No. 15).[24]

SO ORDERED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

July 17, 2003

Margaret J. Kravchuk
United States Magistrate Judge

[24] The Defendants filed a Daubert motion seeking to exclude the testimony of Gregory J. Dana and Casimer Andary, two employees of the Alliance whom the Alliance designated as experts, but who would provide fact testimony as well as opinion testimony. I have not relied on the Andary deposition in making this Recommended Decision. The portions of the Dana testimony I have incorporated, which concerns the Alliance's cost estimates, is in my estimation admissible fact evidence, the Commissioner's objection going only to weight. If this matter were to proceed to trial or other portions of the testimony of these "experts" were deemed to be relevant, the Court could revisit the various arguments made by the parties in relation to qualifications, specialized knowledge, reliability and relevance.

STANDARD, DBHRECUSED

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:02-cv-00149-JAW
Internal Use Only

ALLIANCE OF AUTO v. EPA, ME COMM
Assigned to: JOHN A. WOODCOCK
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1331 Fed. Question

Date Filed: 09/30/02
Jury Demand: None
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

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